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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-229

THE FISH MEAL COMPANY, HARVEY W. SMITH, and TEXAS MENHADEN COMPANY,

Petitioners

versus

J. RAY McDERMOTT & CO., INC.,

Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

I - OPINIONS BELOW 2

II - JURISDICTION 2

III - QUESTION PRESENTED 2

IV - STATUTES INVOLVED 3

V - STATEMENT OF THE CASE 5

VI - REASONS FOR GRANTING THE WRIT:

The question herein presented for review is one of first impression and of such far reaching public concern, involving the interplay between state substantive law and the Federal Ship Mortgage Act, that it should be settled by this Court

a - The Question is One of Fundamental Importance 10

b - Finality *Vel Non* 10

c - The holding below conflicts with holdings of this Court permitting the application of state substantive law for the resolution of private commercial transactions 11

VII - CONCLUSION 14

APPENDIX

Opinion of the Court i

Opinions of the Court on rehearing *en banc* xxvii

CITATIONS

Page

Cases:

Chevron Oil Co. vs Huson, 404 US 97 (1971) .. 13

Gillespie vs United States Steel Corp., 379 US 148, 152 (1964) 10

Just vs Chambers, 312 US 383 (1941) 13

Southern Pacific Co. vs Jensen, 244 US 205 (1917) 12

Swift vs Tyson, 16 Pet. 1 (1842) 12

Wilburn Boat Co. vs Fireman's Fund Ins. Co., 348 US 310 (1955) 13

Statutes:

United States Code:

46 USC §951 ..... 3, 11

46 USC §954(a) 4, 11

Louisiana Revised Statutes:

13:4106 4

13:4107 5

Miscellaneous:

Gilmore & Black, The Law of Admiralty (1957), Pages 590 et seq, §9-57 12

Stevens, Erie R. R. vs Tompkins and the Uniform General Maritime Law, 64 Harvard L. Rev. 246 (1950) 12

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THE FISH MEAL COMPANY, HARVEY W. SMITH and TEXAS MENHADEN COMPANY, petitioners, pray for a writ of *certiorari* to review the judgment of the Court of Appeals for the Fifth Circuit, insofar as it denies application of the Louisiana Deficiency Judgment Statute to an *in personam* action for a deficiency judgment, in connection with the foreclosure of preferred ship mortgages covering a fleet of fishing vessels constructed under contracts drawn, executed and performed in Louisiana.

I

OPINIONS BELOW

The judgment of the Court of Appeals was entered *en banc*, and is reported at 457 F2d 815. The decision overruled a prior opinion of a regular panel of the same Court, reported at 431 F2d 714. Copies of the opinions are reproduced in the Appendix hereto.

II

JURISDICTION

The judgment below was entered on March 23, 1972, and rehearing was denied on May 12, 1972. Jurisdiction of this Court lies under 28 USC §1254.

III

QUESTION PRESENTED

Whether the Federal Ship Mortgage Act, which grants exclusive jurisdiction to the Federal Courts for the foreclosure of preferred ship mortgages, *in rem*, and concurrent federal-state jurisdiction for *in personam* actions for deficiency judgments against the makers of notes secured by such mortgages, precludes application of a State deficiency judgment statute which bars rendition of a personal deficiency judgment when the mortgagee has the property sold without appraisal.

The Court of Appeals held that the Ship Mortgage Act and related federal statutes did not preclude application of the Louisiana Deficiency Judgment Statute, and that, accordingly, the foreclosing shipbuilder-creditor, having subjected the vessels to a judicial sale without appraisal pursuant to a clause in the mortgages, was, conformably to the documents and the applicable state statute, barred from obtaining an *in personam* judgment for any deficiency between the mortgage indebtedness and the proceeds of the sale.

The Court thereupon granted a rehearing *en banc* without oral argument; and, while affirming its panel's decision in other respects, a majority of the Court overruled it on the question presented here, holding that the Ship Mortgage Act, by virtue of its grant of federal jurisdiction for the foreclosure of ship mortgages, when read together with certain federal procedural statutes, forms a comprehensive federal uniform system for the foreclosure of such mortgages (and for deficiencies thereunder) which necessarily precludes application of the Louisiana Deficiency Judgment Statute (three judges dissenting).

IV

STATUTES INVOLVED

46 USC §951:

> "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness se-

cured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively . . ."

46 USC §954(a):

"Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof."

La. RS 13:4106:

"If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

* * * *

La. RS 13:4107:

"RS 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934."

V

STATEMENT OF THE CASE

Respondent, a shipbuilder, agreed to design and construct a fleet of fishing vessels for petitioners, menhaden fishermen, who took title to the vessels on delivery, giving their note to the shipbuilder, secured by two first mortgages for part of the cost of the vessels.

All significant contacts relating to the construction of the vessels, their delivery and registration, preparation, execution and delivery of the note and mortgages, and registry of the mortgages, occurred in Louisiana.

Primarily because of excessive drafts and unseaworthy characteristics, the vessels proved useless for their intended purpose, and were laid up.

Petitioners eventually sued the shipbuilder for breach of contract and for declaration of non-liability under the note and mortgages, for failure of consideration. The shipbuilder countered with a mortgage-foreclosure suit against the vessels *in rem*, coupled with

an *in personam* action against petitioners under the promissory note.[1]

In the foreclosure action, by stipulation of the parties approved by the district court, the vessels were eventually sold at public auction by the United States Marshal, the proceeds of the sale being deposited in the registry of the court to abide the outcome of the litigation.

Taking advantage of applicable clauses in the mortgages, to expedite the Marshal's sale, the foreclosing shipbuilder sought no prior appraisal of the vessels, and none was made.[2] The shipbuilder-mortgagee purchased the vessels at the sale for the sum of $689,000.[3]

Petitioners had raised, by way of defense and counterclaim in the foreclosure action, the same issues of breach of contract which they had raised in their own suit against the shipbuilder. Petitioners demand-

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[1]Petitioners' action was filed in the Federal District Court for the Eastern District of Louisiana, on the basis of diversity of citizenship. The shipbuilder's foreclosure action was filed in the Federal District Court for the Eastern District of Texas, where the vessels were laid up, on the basis of admiralty jurisdiction under 46 USC §§ 951 and 954. By stipulation, petitioners' action was transferred to the Eastern District of Texas where the cases were consolidated and tried.

[2]The mortgages, following the customary Louisiana form, contained a typical "waiver of appraisement" clause, under which the mortgagor expressly waived "all and every appraisement" of the mortgaged property, and renounced "the benefit of appraisement and of all laws relative to the appraisement of property . . ."

[3]Compared to the mortgage note of $3.2 million, and a total construction cost of $4.3 million.

ed jury trial of all issues cognizable at law, and the district court consolidated the cases for trial by jury.

At the conclusion of the evidence, the district judge submitted special interrogatories to the jury. The jury found, *inter alia*, that the vessels were constructed in accordance with the contract specifications prepared by the shipbuilder.

Petitioners moved for a new trial based on prejudicial instructions to the jury, and also for summary judgment of dismissal in the shipbuilder's mortgage foreclosure action, under the Louisiana Deficiency Judgment Act which bars rendition of a deficiency decree, when a mortgagee takes advantage of a "waiver of appraisal" clause in a mortgage, and has the mortgaged property sold without appraisal.

The district court denied both motions. It rendered judgment dismissing petitioners' breach of contract action, and further judgment against petitioners, *in personam*, for the full amount of the note plus attorneys' fees and interest, subject to credits for the proceeds of the marshal's sale and for whatever profits the shipbuilder might realize from subsequent sales of the repossessed vessels.

The Court of Appeals held that the district court committed reversible error when it charged the jury "that the unsuitability of the vessels would not indicate that they had not been constructed in accordance with the contract". It reversed the judgment rendered in the

breach of contract action, and remanded the proceedings for a new trial; and it also vacated the *in personam* deficiency judgment rendered against petitioners in the foreclosure action.

The Court held further, that while Louisiana cannot prohibit the taking of a deficiency judgment in an admiralty court, "by the same token the obligations of the parties are to be determined from the mortgages themselves. . . . The parties are presumed to have known the Louisiana law of mortgages and to have acted accordingly. That law provided that the sale of mortgaged property under a waiver of appraisal (as here) without prior appraisal fully satisfies and discharges the debt insofar as it constitutes a personal obligation of the debtor. The law of Louisiana seems to be clear that the mortgagee may require a waiver and it may, if it wishes, sell under the terms of that waiver, but when it exercises that privilege it surrenders the right to pursue the debtor *in personam* for the balance due. The debt is extinguished and no deficiency survives." 431 F2d at 722-724.[4]

The Court of Appeals granted a rehearing *en banc* without oral argument: "The question whether state or federal law governs deficiency judgments under the

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[4]The decision noted further that "the admiralty court under the terms of the federal statute clearly has the right to grant deficiency judgments, where deficiencies exist. To ascertain the existence or non-existence of the deficiency, the federal law being silent on the subject, we are compelled to look to the mortgage and to state law governing rights of the parties under the mortgage, especially when there is no question as to the place of execution, the place of recordation, and the home port of the vessel involved. . ." 431 F2d at 724.

Ship Mortgage Act is a matter of such vital public concern that we placed this action for the foreclosure of a preferred ship mortgage *en banc*." 457 F2d at 816.

A majority of the Court (three judges dissenting) held, overruling the original panel, that the Ship Mortgage Act, when read together with statutes regulating judicial sales in the federal courts, "forms a comprehensive procedure for the foreclosure of a preferred ship's mortgage, the sale of the vessel and any resulting deficiency adjudged against the debtor *in personam*"; and that "the Louisiana statute may not limit or restrict the application of the Ship Mortgage Act or affect the uniform application of that Act ..." 457 F2d at 818-819.

The Court *en banc* agreed with its panel's decision that the deficiency judgment against respondents must be vacated, "but for a different reason. The liability under the contract upon which the mortgage is based has been remanded to the district court for a new trial. Until that action is decided, any application for a deficiency judgment would be premature." 457 F2d at 819.

The shipbuilder is petitioning this Court to review the decision of the Court of Appeals in so far as it vacated the deficiency judgment rendered against petitioners herein and remanded the proceedings for a new trial. Petitioners herein will file their opposition to the shipbuilder's petition. Petitioners herein submit this cross-petition with its separate "Statement of the Case",

directed to that portion of the decision of the Court of Appeals, which holds that the Ship Mortgage Act and related federal statutes preclude application of the Louisiana Deficiency Judgment Statute.

VI

REASONS FOR GRANTING THE WRIT

The question herein presented for review is one of first impression and of such far-reaching public concern, involving the interplay between state substantive law and the Federal Ship Mortgage Act, that it should be settled by this Court.

a - The Question is One of Fundamental Importance

Although the Court of Appeals vacated the deficiency judgment rendered against petitioners, and remanded the proceedings for a new trial because of erroneous jury instructions, it nevertheless considered the question presented here to be "of such vital public concern" that it felt constrained to decide it *en banc*. 457 F2d at 816.

b - Finality Vel Non

As stated, the judgments against petitioners have been vacated and the proceedings remanded for new trial. Petitioners nevertheless urge the Court to review the question herein presented, because of the clear-cut issue of law involved, and its fundamental importance to, and the avoidance of extraordinary inconvenience in, the further conduct of the case.[5]

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[5]*Gillespie vs United States Steel Corp.*, 379 US 148, 152 (1964).

c - The Holding Below Conflicts with Holdings of this Court Permitting the Application of State Substantive Law for the Resolution of Private Commercial Transactions.

The decision below rests on the premise that the Louisiana Deficiency Judgment Statute contravenes the Federal Ship Mortgage Act. However, all that the Ship Mortgage Act provides is (a) an exclusive forum for the *in rem* foreclosure of preferred ship mortgages, and (b) a non-exclusive forum (concurrent with the State courts) in which a mortgagee may seek a deficiency (if one exists).

Thus, after providing, in 46 USC §951, for exclusive jurisdiction in the Federal District Court for foreclosure against the *res* itself, the Act goes on, in 46 USC §954, to say that the mortgagee "may, in addition to all other remedies granted by this chapter, bring suit *in personam* in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof".

The Act does not grant any substantive rights, or even contain any substantive law regarding ship mortgages, which are simply chattel mortgages substantively governed by state law. Specifically, the Federal Act does not state that a deficiency judgment shall be granted as a matter of substantive law, but merely extends admiralty jurisdiction to suits to recover such judgments. It does not purport cut off any de-

fenses which the debtor may have to such a suit under applicable state law.[6]

The original opinion below, applying the contract provisions which the parties made for themselves in the note and mortgages, held that when the shipbuilder exercised its option to proceed with sale of the vessels without appraisal, it was barred from obtaining an *in personam* deficiency judgment under the express provisions of the Louisiana statute.

As pointed out by Judge Coleman, dissenting from the *en banc* decision below, "there is no federal law of mortgages; the mortgagors, mortgagees and guarantors chose to define their liabilities in exact keeping with the Louisiana statutes; and Admiralty courts have no jurisdiction to rewrite the contract. . . . The Ship Mortgage Act contains nothing which would deny the parties this right and its silence should not authorize court-made contracts in search of some kind of undefined 'uniformity' ". 457 F2d at 819.

The foundation of the maritime-uniformity doctrine, on which the court below relied, was this Court's decision in *Southern Pacific Co. vs Jensen*, 244 US 205 (1917). Little now remains of that doctrine. As pointed out in the leading article on this subject, the maritime-uniformity theory had the same source as the commercial-uniformity doctrine of *Swift vs Tyson*. Stevens, *Erie R. R. vs Tompkins and the Uniform General Maritime Law*, 64 Harvard L. Rev. 246 (1950).

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[6]Gilmore & Black, *The Law of Admiralty* (1957), pages 590 et seq, §9-57.

This Court's overruling of *Swift vs Tyson* foreshadowed its later disregard of the *Jensen* theory of maritime uniformity, applying state law in maritime suits. *Just vs. Chambers,* 312 US 383 (1941).[7]

This Court has held that federal courts are bound to follow state law, not so-called "federal admiralty law", in determining the availability of the defense of breach of warranty in a suit to recover on a marine insurance policy. *Wilburn Boat Co. vs Fireman's Fund Ins. Co.,* 348 US 310 (1955). And just recently, this Court held that Louisiana's one-year limitation statute was to be applied to actions for personal injuries occurring on fixed structures on the Outer Continental Shelf. *Chevron Oil Co. vs Huson,* 404 US 97 (1971).

On the same principles, the availability of a substantive defense afforded under the mortgage and the applicable state law to which the mortgage refers expressly, in a suit seeking an *in personam* deficiency judgment, should be governed by that state law.

The effect of the decision below is to nullify state substantive law, in those instances in which concurrent federal jurisdiction is granted to enforce contract

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[7]Speaking for a unanimous Court in the cited case, Chief Justice Hughes said: "The criterion applied in determining the validity and effect of state legislation . . . is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction", on the basis that "uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." 312 US at 391-2.

rights created by that law, on the ground that these rights appear to conflict with some vague federal policy of uniformity.

VII

CONCLUSION

It is respectfully submitted that a writ of *certiorari* should issue to review the decision of the Fifth Circuit with respect to the question herein presented.

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Of Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing cross-petition were this day served on counsel for Respondent by mailing the same in post-paid envelopes addressed to them at their offices, First City National Bank Building, Houston 77002 and 1122 Whitney Building, New Orleans 70130.

New Orleans, August , 1972.

Frank J. Peragine

APPENDIX

J. RAY McDERMOTT AND COMPANY, Inc.,
Plaintiff-Appellee,
Cross Appellant,

versus

The VESSEL MORNING STAR et al., etc.,
the Fish Meal Company, Harvey W. Smith,
Defendants-Appellants,
Cross Appellees,

and

Texas Menhaden Company,
Intervenor-Appellant,
Cross Appellee.

No. 28496

United States Court of Appeals,
Fifth Circuit.
Sept. 15, 1970.

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge:

This appeal presents a contractual Humpty Dumpty which no court could ever put together again. By failing in advance to protect themselves from the consequences of serious errors of judgment, the litigants have taken costly falls from a wall of their own making. They have repaired to the courts for succor, but there are situations which no court can cure. Adding

to the pain of past misfortunes, we are compelled to reverse the judgment of the court below and to remand the litigation for a new trial.

I

BACKGROUND

J. Ray McDermott and Company, Inc., hereinafter referred to as McDermott, builds ships at its shipyard in Morgan City, Louisiana.

The Texas Menhaden Company (located in Sabine Pass, Texas) and The Fish Meal Company (located in Morgan City) are two of many corporations owned by the Smith family, giants of the menhaden fishing world. Harvey W. Smith was President of both companies. The companies and their President will generally be referred to in the course of this opinion as the Smith interests.

In the United States menhaden are not considered to be edible fish. Their primary use is for fertilizer and chicken feed. In other countries, particularly in Europe, menhaden are manufactured into margarine. In the Gulf of Mexico, menhaden fishing is a seasonal activity, lasting from April to October. The menhaden are caught in shallow waters, generally at depths of from eight to twelve feet. The typical menhaden fishing boat is from 125 to 220 feet in length. It is not unusual for these boats to plow through soft mud, beneath shallow waters, to reach the menhaden schools. When a school is sighted the boat casts off two "purse

boats," usually about 35 footers, which, operating under their own power and with a net between them, surround the school. By the use of hydraulically powered winches, the nets are drawn tight around the fish. The mother ship then comes alongside and pumps the catch from the purse into the cargo holds. The fish are there kept in a chilled condition and taken to nearby plants for processing. The captains and the crews are compensated according to the catch, and the competition among fleets from about fifteen menhaden plants along the Gulf Coast may aptly be described as terrific.

McDermott shipyard in Morgan City was located about a mile from the menhaden processing plant of The Fish Meal Company and for several years McDermott had repaired the menhaden fishing boats and proclaimed that it kept in its employ a full time naval architect. Prior to the fall of 1965, however, *McDermott had never built a menhaden fishing boat.*

Alfred Davies was the manager of the menhaden processing plants owned by The Fish Meal Company at Morgan City, Louisiana, and by Texas Menhaden Company at Sabine Pass, Texas. He knew that McDermott had never built a menhaden boat. V. J. LeBlanc was the general manager of the McDermott shipyard. In October, 1965, verbal negotiations between Davies and agents of McDermott culminated in a written contract for the construction of *eight* menhaden fishing vessels.

The proposal and acceptance on behalf of the parties read as follows:

"September 15, 1965

"Texas Menhaden Company
P. O. Box 68
Sabine Pass, Texas

Attention: Mr. Al Davies

Subject: Construction of Eight (2) 165'x35' x14' *Menhaden Fishing Vessels.* (Emphasis by the Court). McDermott Shipyard Proposal No. Q-1136.

Gentlemen:

"We propose to furnish labor, material, and plant facilities to construct, outfit, and deliver each of eight (8) subject vessels for the sum of Three Hundred Twenty-One Thousand Seven Hundred Sixty-Nine Dollars and No/Cents ($321,769.00), which is a total of Two Million Five Hundred Seventy-Four Thousand One Hundred Fifty-Two Dollars and No/Cents ($2,574,152.00) for all eight (8) vessels, in accordance with applicable specifications and subject to the following conditions.

"1. Applicable Specifications are those entitled 'Specifications for the Construction of a 165' Menhaden Fishing Vessel for Texas Menhaden Company, Sabine Pass, Tex-

as', dated September 13, 1965, prepared by McDermott Shipyard, Morgan City, Louisiana, and the accompanying contract plans as listed therein.

"2. In connection with Item 110, Page 4 of Specifications, it is understood that Shipyard will install refrigeration equipment, fish pump, and hardening winch on their foundations. The respective refrigeration, fish hold, and hydraulic winch piping systems are not included in this proposal but will be subject to the terms of Item 109, Page 3 of Specifications.

"3. In connection with Item III, Page 7 of Specifications, we have included in our proposal coordination and witnessing of tank testing. Costs of model and towing tank tests, as well as traveling and incidental expenses, are not included.

"4. We will deliver the subject vessels floating alongside our pier on or before June 1, 1966, provided this proposal is accepted within five (5) days of the date of this letter.

"5. Terms of payment are to be subject to a separate agreement but will be, in general, as follows:

a. The total sum will be financed by the Builder at an interest rate of six percent (6%) on the unpaid balance for a period of thirty-six (36) months.
b. Interest will start accruing on the following percentages of the unpaid balance according to the following schedule:
    1) On twenty-five percent (25%) of total sum outstanding upon acceptance of proposal.
    2) On fifty percent (50%) of total sum outstanding on February 15, 1966.
    3) On one hundred percent (100%) of the total sum outstanding on each vessel upon completion of each vessel, as per applicable specifications.
c. Capital and interest payments will be made at equal intervals for a period of thirty-six (36) months from completion of each vessel, as per applicable specifications. Payment intervals are to be determined in above mentioned separate financial agreement.

"This quotation is valid for a period of ten (10) days from the date of this letter, after which time, we reserve the right to withdraw or amend the same. 'The quoted prices do not include any Louisiana State or Parish Sales or Use Taxes. If any such taxes are due, they will be paid by you or reimbursed to us if it is nec-

essary that we pay them'. J. Ray McDermott & Co., Inc. operates in the State of Louisiana under Louisiana State Contractors License No. 246.

"We thank you for the opportunity to submit this proposal and should you find it satisfactory, please sign and return the original.

"Very truly yours,
McDERMOTT SHIPYARD
s/ V. J. LeBlanc
V J. LeBlanc
Division Manager

VJL:ml

"ACCEPTED: TEXAS MENHADEN COMPANY
BY: s/ Harvey Smith
DATE: 10/5/65"

It is at once apparent from the caption of McDermott's proposal that it agreed to build and the Smith interests expected to receive vessels suitable for menhaden fishing. It is equally apparent from paragraph 1 of the proposal that the applicable specifications were to be those prepared by McDermott.

Section 1, paragraph 101, of these specifications provided that McDermott should deliver to Texas Menhaden "an all welded, twin screw diesel powered vessel for pursing and trawling in the Gulf of Mexico".

It was further specified that the design criteria for this vessel [of which there were to be eight] would provide for a free running speed, when light, of about 14 3/4 miles per hour, with a fish hold capacity of about 700 short tons of menhaden. It was additionally specified that ship draft, light, would be approximately 6 feet, 6 inches. Loaded draft would be 9 feet, 6 inches.

The contract was made in Louisiana. The ships were to be built in Louisiana and delivered in Louisiana.

The shipbuilder, with no prior experience in the field, did not build one vessel and test it with a regular menhaden crew under actual fishing conditions before building the other seven. The Smith interests did not insist on such a procedure. The Smiths wanted speedy delivery and McDermott was willing to comply. Like Admiral Farragut at Mobile, but without his famed success, both parties steamed full speed ahead with little regard for the torpedoes, until it was too late.

The first four of the projected eight vessels were delivered by McDermott in the middle of June, 1966. As per the contract, the Smiths outfitted the vessels with engines and fishing equipment. The weight of these various appurtenances, including the concrete lining in the holds, accounted for a nine inch increase in the draft of the vessels.

Two marine architects and the captains of the vessels after they had set out to fish testified that the boats were wholly unsatisfactory for the use intended and were, in fact, unseaworthy. There was testimony

that with only 500 tons of fish in the holds the boats drew as much as 14 1/2 feet of water, whereas the contract specified that draft would be 9 feet, 6 inches when loaded with 700 tons of fish. The excess draft allegedly impaired the ability of the mother ship to operate in the shallow waters where menhaden are ordinarily found. The captains further testified that the boats were "out of trim" and suffered from a "quick roll" which rendered the raising and lowering of the purse boats and the loading of the fish dangerous to the crews.

McDermott's naval architect had never designed a menhaden boat. The Smith interests had no naval architect. McDermott agreed to design the boats. With the full knowledge of the Smiths the design was adapted from plans for an off shore supply boat which McDermott had never built.

Not to be outdone by McDermott's gamble, on October 28, 1966, while attempts were being made to use four of the boats, The Fish Meal Company went ahead and executed a promissory note for the full contract price for the vessels. Harvey W. Smith, in his personal capacity, at the bottom of the note, signed a written guarantee of payment. As a condition to the execution of the note and mortgages, the Smith interests requested and received a reservation of all of Smith's rights under the construction contract. The note and preferred ship mortgages were duly registered at the Customs House in New Orleans pursuant to the Federal Ship Mortgage Act, 46 U.S.C. §911 et seq.

Later, when the boats allegedly proved to be unfit, the Smith interests, with the consent of McDermott, tried to sell them to be used for some other purpose. These efforts failed.

The result of all this was that McDermott found itself carrying a note for $3,233,891.36 (secured by preferred ship mortgages) which the Smiths refused to pay. Simultaneously, the Smiths claimed to be saddled with eight boats which were useless for menhaden fishing. Not being able to resolve their differences (or refusing to do so), the parties looked to non-seagoing courthouses for a remedy.

II

THE LITIGATION

In the United States District Court for the Eastern District of Louisiana, the Smith interests sued McDermott for breach of contract and for a declaration of non-liability under the notes and mortgages, alleging failure of consideration.

The boats had been laid up in a freshwater bayou near Bridge City, Texas, to prevent deterioration. So, in the United States District Court for the Eastern District of Texas, at Beaumont, McDermott filed a mortgage foreclosure suit against the vessels *in rem* and also against the maker and endorser of the note, The Fish Meal Company and Harvey W. Smith, *in personam*. McDermott had the vessels seized.

McDermott then sought to dismiss, or alternatively to stay, the breach of contract action brought in New Orleans.

The upshot was that the parties STIPULATED *both* the transfer of the breach of contract action to the district court at Beaumont and the judicial sale of the vessels under the direction of that Court, the proceeds to be deposited in the Registry to await the outcome of the litigation.

After due advertisement, the vessels were sold at public auction by the United States Marshal at Beaumont. For reasons not apparent in the record the Smith interests sought no independent appraisal of the vessels prior to the Marshal's sale. Neither did McDermott. The highest bid for all eight vessels was $689,000, submitted by McDermott. The sale to McDermott was confirmed without opposition. McDermott made bond for the net proceeds of the sale, to abide the outcome of the litigation.

Thereafter, the cases were consolidated for trial. The result was that two trials proceeded simultaneously. McDermott's mortgage foreclosure action was tried to the Court and the Smith suit for breach of contract went to a jury.

The first special interrogatory submitted to the decision of the jury was: "Do you find from a preponderance of the evidence that the vessels were constructed by J. Ray McDermott and Company, Inc. in accordance with the contract specifications and drawings as amended without any material variance?"

To this the jury answered: "Yes".

At the trial level this put an end to the Smiths' law suit, except for the contention that because McDermott took advantage of a "waiver of appraisal" clause in the mortgage and allowed the mortgaged property to be sold without an appraisal no deficiency judgment could be taken against Fish Meal and Harvey Smith personally since such was prohibited by the Louisiana Deficiency Judgment Act, LSA-R.S. 13:4106.

The Smiths moved for a new trial because of asserted prejudicial instructions to the jury and because the verdict was contrary to the weight of the evidence. They also moved for a summary judgment in their favor as to any deficiency. These motions were denied.

As to McDermott's mortgage foreclosure action, the Court entered its own findings of fact and conclusions of law, granting judgment against Fish Meal and Harvey Smith, *in personam,* for the full amount of the note, plus interest and attorneys fees, subject to a credit for the net proceeds of the Marshal's sale, and subject to further credit equal to whatever profit (if any) which McDermott might later realize from resale of the vessels. The district court was moved to the latter requirement because, as matters stood, McDermott became the owner of the vessels in question for $689,000, and it likewise became the owner of a judgment against the Smith interests, *in personam,* for over $2,500,000, when the original contract price for the vessels amounted to $2,574,152. In other words, McDermott got its $2,574,142 worth of vessels (contract price)

for $689,000. In addition, McDermott acquired the engines and other valuable property installed in the vessels by the Smith interests at a cost of about a million dollars.

On the other hand, if McDermott could obtain no deficiency judgment against Fish Meal and Harvey Smith, then it simply got its boats back (plus equipment) — boats which had theretofore proven to be unsellable.

The Smith interests have appealed from both judgments, and McDermott has appealed from that portion of the judgment in the foreclosure suit which requires it to account for and to credit the deficiencies with any profit which might be realized from the subsequent sale of the vessels previously seized and sold by the Marshal.

In our opinion, the judgment on the jury verdict must be reversed because of an error in the instructions to the jury. This likewise requires that the judgment for McDermott in the foreclosure proceeding be vacated. This renders it unnecessary that we should reach or decide the cross appeal filed by McDermott.

III

THE TRIAL

It was McDermott's position that it had delivered the ships without material variance from the contractual specifications and was entitled to be paid.

The Smith interests claimed a failure of consideration caused by McDermott's breach of contract in the following particulars:

1. Excess draft; inability to fish in shallow waters;

2. Complete uselessness of at least one-third of the hold space; lack of the contractual capacity of 700 tons;

3. Lack of trim, making it impossible to properly steer the vessels;

4. The quick roll characteristic of the vessels;

5. Inability to lower, raise, and tow the purse boats;

6. Flat bottoms on the vessels rather than the true "V" bottom required for menhaden fishing in shallow waters.

The Smiths also claimed damages for the alleged breach of contract.

McDermott countered with the contention that after the execution of the written contract the Smith interests had ordered various changes (or innovations) in the vessels which materially altered the contract and which had affected the ultimate performance of the vessels in the particulars complained of.

To this the Smiths responded that the primary requirements of the contract, suitability for menhaden fishing, draft, fish hold capacity, and general seaworthiness had never been changed; that they relied on McDermott's naval architects to preserve these indispensable features because McDermott undertook the design of the vessels to accomplish the purposes intended.

We do not set forth a witness by witness resume of the lengthy trial testimony. The evidence for one side contradicted that of the other in many particulars. McDermott's managers and Smith's managers rarely agreed on anything. The naval architects called by both sides were in material disagreement. The testimony of the ship captains as to the defects of the vessels was largely, if not altogether, uncontradicted. The credibility of the witnesses and the weight of their testimony, if any, within the appropriate rules, were for the resolution of the jury.

In his instructions to the jury the trial judge stated, *inter alia:*

> "The Court would instruct you further that the fact that the vessels did not prove suitable for fishing would not indicate that the vessels were not constructed in accordance with the contract, because the very conception of the vessel was an innovation and it was thought, no doubt with good faith on the part of both parties, that this type of vessel would prove suitable and desirable for fishing.

> "[I]f you find that they were not suitable for fishing, — that in itself does not mean that the contract was breached and the vessels were not constructed in accordance with the terms of the contract."

Before the jury retired to consider its verdict, the Smiths duly objected to this language. The objection was overruled. This is the basis for one facet of the appeal.

In the conclusion of its instructions, the Court continued:

> "In making this determination you must take into consideration whether or not McDermott constructed the vessels without any material variance, in accordance with the terms, conditions, specifications and drawings as amended and furnished the defendant. If you find that they were from a preponderance of the evidence, then you will find in favor of McDermott."

IV

THE DECISION

Both San Miguel, a graduate of M.I.T., the naval architect and chief engineer in the full time employ of McDermott, and LeBlanc, the general manager for McDermott, testified that Davies, general manager for the Smiths, selected the drawings (in McDermott's

possession) of a supply boat and directed that it be converted to a vessel which could be used for menhaden fishing during the menhaden season and for trawling at other seasons. Mr. LeBlanc said that San Miguel "changed the specifications as Mr. Davies wanted t h e m changed". Davies denied this. He claimed that he did not tell San Miguel how to draw the plans and specifications for the boats nor did he tell them what kind of boat to use as a model in their design. He contended that no one connected with Smith interests had anything to do with the design or the configuration or construction of the boat. He contended that LeBlanc told him that San Miguel would be the one who would handle the design, that he was a top notch marine architect.

The answer to these oral disputes, however, is found in the language contained in paragraph 1 of McDermott's contract proposal of September 15, 1965 [page 716, ante] which categorically states that the specifications are those "prepared by McDermott Shipyard, Morgan City, Louisiana, and the accompanying contract plans as listed therein".

Captain William H. Fortner took one of the vessels, the DOUBLE-O-SEVEN, to fish when it came out of McDermott's yard. He testified that the boat drew 9 feet light, that once when 75% loaded the boat drew 14 feet at the bow and 12 1/2 feet at the stern, and that San Miguel saw it. The DOUBLE-O-SEVEN went aground on one occasion while other boats were fishing all around it and had to be pulled out by a tug boat. Fortner was the only man who could steer the vessel

and "not too good". He had trouble with the trim, "she would drop to one side or the other". In his opinion the boat was not seaworthy. He agreed to serve as captain because San Miguel "told me she was going to be the best pogy boat, menhaden boat, in the Gulf, that he was a naval architect and I was not, and I thought I could be wrong about the boat". Mr. Davies also told him she would be a good boat. The boat was too flat bottomed. It could not tow purse boats. When asked if he would go back on this boat and take her to sea, he replied, "They don't have enough money".

Captain Douglas Brill, skipper of the MUD LUMP, testified to like effect and pronounced the vessel unseaworthy.

It was then stipulated that six other witnesses, listed by name, would, if called, give similar testimony with reference to their efforts to operate these boats for menhaden fishing.

A. *The Breach of Contract*

It is undisputed that these parties had a written contract. The contract proposal recites that McDermott prepared the plans and specifications. The contract therefore is entitled to a strict construction against McDermott, Lawson v. Martin Timber Company, 1959, 238 La. 467, 115 So.2d 821. Unambiguous contracts cannot be destroyed by ambiguous circumstances, Cardos v. Cristadoro, 1956, 228 La. 975, 84 So.2d 606. He who prepares the plans and specifications of a structure and afterwards contracts for its construction accord-

ing to the plans and specifications is responsible for any defect or insufficiency in the specifications. He cannot escape responsibility for defectiveness of the work by taking the ground that the defect was in the specifications rather than in the work. He is responsible for both. Barraque v. Neff, 1942, 202 La. 360, 11 So.2d 697, citing Louisiana Molasses Company v. LeSassier, 52 La. Ann. 2070, 28 So. 217.

McDermott knew when it undertook the preparation of the specifications and the construction in accordance therewith it was embarking upon a new activity. McDermott's proposal stated that it was to build menhaden boats and it is clear that McDermott knew the proposed vessels would be unlike any other menhaden boat previously in use. Yet, the contract contains no reservations or exceptions for the consequences of novelty or faulty design.

We see nothing ambiguous about the terms of this contract. There is no contention that the parties labored under any mistake or fraud. Therefore, the contract as written must govern the relationship of the parties and their respective obligations, and the intent of the parties is to be determined by the language of the contract, Vaughan v. P. J. McInerney and Company, La.Ct. of App., 1943, 12 So.2d 516, 518; Bank of Napoleonville v. Knobloch & Rainold, 1918, 144 La. 100, 80 So. 214; Fitzgerald v. Hyland, 1942, 199 La. 381, 6 So.2d 321.

It is true that after the execution of the instruments evidencing the original contract, changes were made

in the vessels at the solicitation of Harvey Smith, such as, the stern was raised two feet higher, a ramp was installed, and the engine houses were moved forward.

There was testimony in the record that San Miguel issued no warning that these changes would interfere with the efficiency or seaworthiness of the vessels. If the changes were likely to produce negative results in these respects it was San Miguel's duty to warn of these possibilities, if they were to be chargeable to the Smiths, Kunnes v. Bryant, La.Ct. of App., 1951, 49 So.2d 872.

Thus, we have a case in which a party contracted to construct vessels which would be menhaden boats of prescribed draft and fish hold capacity. There was abundant testimony, if a jury had chosen to believe it, that these specifications had not been met. Obviously, the Smiths were entitled to expect delivery of seaworthy vessels. Again, there was abundant testimony, if the jury had chosen to believe it, that this had not been accomplished.

We are therefore driven inescapably to the conclusion that under the law and the facts of this case it was error for the district judge to tell the jury that the unsuitability of the vessels would not indicate that they had not been constructed in accordance with the contract. For this reason, the judgment in the breach of contract — failure of consideration action must be reversed and remanded for a new trial to be conducted consistently with the principles herein announced.

As to the complaint in admiralty against the vessels *in rem*, to foreclose the mortgages, and to obtain a deficiency judgment against the makers of the note secured by the mortgages, in his findings of fact and conclusions of law the trial court states, "The court agrees with the jury's finding that the vessels were constructed in accordance with McDermott's contract as amended and so holds". Accordingly, and since this was a consolidated proceeding, the judgment of the district court in this regard will be vacated and remanded for further proceedings not inconsistent herewith.

B. *The Deficiency Judgment*

The issue as to a deficiency judgment against The Fish Meal Company and Harvey Smith, *in personam*, remains in the case. As a matter of judicial economy and for the guidance of the trial court at the retrial of this case, we now consider that question.

The district court granted a deficiency judgment in favor of McDermott and against Fish Meal and Harvey W. Smith *in personam* for $3,233,891.36, with 6% interest per annum from August 9, 1966, plus attorneys fees and court costs, to be reduced by the sum of $666,747.25, the net amount realized from the Marshal's sale of the eight boats.

McDermott contends that this was proper under the provisions of the Ship Mortgage Act of 1920, 46 U.S.C. § 954 (a):

"954. *Suits in personam in admiralty on default*

"(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel *or any deficiency in the full payment thereof.*" [Italics by the Court.]

When McDermott foreclosed its preferred ship mortgages and procured a sale of the vessels it did not first have them appraised as provided by the Revised Statutes of Louisiana, 13:4106, 4170:

"§4106. *Deficiency judgment prohibited if sale made without appraisement*

"If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, *the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor.* [Italics by the Court]. The mortgagee or other creditor shall not have a right thereafter to proceed against

the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

"If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby."

"§ 4107. R.S. 13:4106 declares a public policy and the provisions thereof cannot, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934."

Prior to the enactment of the Ship Mortgage Act of 1920, the admiralty had no jurisdiction of a suit to foreclose a mortgage on a ship. The Act, however, granted unto admiralty exclusive jurisdiction to enforce the lien of a preferred ship mortgage. There can now be no suit to foreclose such a mortgage in a state court, Detroit Trust Company, Trustee, v. The Thomas Barlum, 1934, 293 U.S. 21, 32, 33, 42, 55 S.Ct. 31, 79 L.Ed. 176.

That these vessels were covered by preferred ship mortgages is not disputed. That the district court, sitting in admiralty, had exclusive jurisdiction over the foreclosures is not to be doubted.

Fish Meal and Harvey W. Smith say that because the mortgages provided for waiver of appraisal and the vessels were sold without an appraisal no deficiency arose because La.R.S. 13:4104, 4105, 4106, 4107, expressly declares that "if a mortgagee takes advantage of a waiver of appraisement and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor".

In other words, McDermott preferred to follow a course which caused the debt to be extinguished by operation of law and ipso facto it could not provide the basis for a deficiency.

The Ship Mortgage Act is now a half century old but we find no previous case on the specific issue here involved. The parties have cited none.

We begin by saying that provisions of the Ship Mortgage Act are paramount and if a conflict exists between it and a state statute the federal statute would of course prevail.

Is there a conflict?

The difficulty is that "the Mortgage Act is not a comprehensive statute *** it contains sketchy provisions on foreclosure; *** the Mortgage Act suggests no answer to many important questions *** there is no Federal Law of mortgages, decisional or statutory, with the exception of the Mortgage Act itself". Gilmore and Black, The Law of Admiralty 9—57,

pp. 590, 591. The federal decisions, sparse as they are, agree that there is no federal law of mortgages, Bergren v. Davis and The Oil Screw called Acadia (D. Conn., 1968) 287 F.Supp. 52, 55, citing Southland Financial Corp. v. Oil Screw Mary Evelyn (E.D.La., 1965) 248 F. Supp. 520, 522.

In *Bergren,* supra, in something of a similar controversy, the court noted that "the mortgage was executed in the State of Maine, the vessel's home port is there, and the mortgage was recorded there. Hence the Court will look to the law of Maine."

In the case now before us the mortgage was executed in Louisiana, it was recorded in Louisiana, and although the vessels were laid up in Texas the home port [of The Fish Meal Company] was Morgan City, Louisiana.

Obviously, Louisiana cannot prohibit the taking of a deficiency judgment in an admiralty court. By the same token the obligations of the parties are to be determined from the mortgages themselves.[1] This is a substantive matter, not a procedural one. The parties are presumed to have known the Louisiana law of mortgages and to have acted accordingly. That law provided that the sale of mortgaged property under a waiver of appraisal (as here) without prior appraisal fully satisfies and discharges the debt insofar as it constitutes a personal obligation of the debtor. The law of Louisiana seems to be clear that the mortgagee may

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[1]Provisions of Louisiana law are incorporated into Louisiana contracts and form a part of the contract as though expressly written therein, Dantoni v. Board of Levee Commissioners (La., 1955) 80 So.2d 81.

require a waiver and it may, if it wishes, sell under the terms of that waiver, but when it exercises that privilege it surrenders the right to pursue the debtor *in personam* for the balance due. The debt is extinguished and no deficiency survives. The law applies to sureties as well as to principal obligors, Simmons v. Clark, 1953, La.Ct.App., 64 So.2d 520.

We hold that the admiralty court under the terms of the federal statute clearly has the right to grant deficiency judgments, where deficiencies exist. To ascertain the existence or non-existence of a deficiency, the federal law being silent on the subject, we are compelled to look to the mortgage and to state law governing rights of the parties under the mortgage, especially where there is no question as to the place of execution, the place of recordation, and the home port of the vessel involved, *Bergren*, supra.

And this is true although McDermott could not have known whether there would be a deficiency, or the amount of it, until after the sale. All it had to do to protect itself on that subject was to have had a prior appraisal. It is immaterial that the sale was judicial. Judicial sales are expressly named in the statute.

Consequently McDermott is not entitled to a deficiency judgment against Fish Meal or Harvey W. Smith.

The judgment in the breach of contract — failure of consideration case is reversed and remanded for a new trial.

The judgment of the District Court sitting in admiralty is vacated and remanded.

Before JOHN R. BROWN, Chief Judge and WISDOM,* GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

DYER, Circuit Judge:

The question whether state or federal law governs deficiency judgments under the Ship Mortgage Act is a matter of such vital public concern that we placed this action for the foreclosure of a preferred ship mortgage en banc.

The district court granted a deficiency judgment in favor of McDermott (the shipbuilder) and against the Smith interests (the purchaser) for the difference of the amount bid on the judicial sale of the vessels and the balance of the indebtedness due on the notes secured by the preferred mortgage.

The prior opinion in this case said:

> That Law [Louisiana] provided that the sale of mortgaged property under a waiver of appraisal (as here) without prior appraisal fully satisfies and discharges the debt insofar as it constitutes a personal obligation of the debtor. The law of Louisiana seems to be clear that the mortgagee may require a waiver and it may, if it wishes, sell under the terms of that waiver, but when it exercises that privilege it surren-

*Judge Wisdom did not participate in the consideration of or in the decision in this case.

> ders the right to pursue the debtor *in personam* for the balance due. The debt is extinguished and no deficiency survives . . .

We hold that the admiralty court under the terms of the federal statute clearly has the right to grant deficiency judgments, where deficiencies exist. To ascertain the existence or non-existence of a deficiency, the federal law being silent on the subject, we are compelled to look to the mortgage and to state law governing rights of the parties under the mortgage . . . 431 F.2d at 724.

Because of the provisions of Louisiana law concerning appraisal McDermott was held not to be entitled to a deficiency judgment against the Smith interests and the judgment of the district court was vacated. We hold that the panel opinion was based upon an error of law, which we overrule. Nevertheless, we vacate the deficiency judgment to await the outcome of a new trial ordered by this Court on the breach of contract action brought by the Smith interests.

The vessels constructed by McDermott under contract with the Smith interests were sold at a public sale and the sale was confirmed by the court without an appraisal having been made. The sale brought a price insufficient to pay the debt and extinguish the mortgage. Consequently, a deficiency judgment for the difference was rendered against the Smith interests *in personam*. 46 U.S.C.A. § 954(a). Smith did not object to the sale but attacked the deficiency judgment, contending that under La.R.S. 13:4106 and 4107 a deficiency judgment is barred whenever there has been no appraisal. Because the federal statutes regulating ju-

dicial sales do not speak to the validity *vel non* of a deficiency judgment where there has been a public sale without appraisal, Smith argues that there is a gap in the federal procedure and that the Louisiana statute, as the law of the adjacent state, should be caulked into this cranny. We disagree.

Initially, it is important to emphasize the purpose underlying the enactment of the Ship Mortgage Act of 1920. This Act is a part of the Merchant Marine Act of 1920, 46 U.S.C.A., §861 et seq. Congress recognized that maritime matters have a great impact upon interstate and international commerce and that there was a need for a uniform body of maritime law. *See* The Lottawana, 1875, 88 U.S. (21 Wall.) 558, 577, 22 L.Ed 654. The congressional intent in enacting this legislation was to promote and encourage the continued development of the American merchant marine. Mastan Co. v. Steinberg, 3 Cir. 1969, 418 F.2d 177, 179, cert. denied, Todd Shipyards Corp. v. Mastan Co., 1970, 397 U.S. 1009, 90 S.Ct. 1238, 25 L.Ed.2d 422. "The passage of the Ship Mortgage Act came about primarily from the necessity of affording substantial security to persons supplying essential financing to the shipping industry." Merchants & Marine Bank v. The T. E. Welles, 5 Cir. 1961, 289 F.2d 188, 193-194.

Although the federal courts have jurisdiction of admiralty and maritime matters because of the recognized necessity of national control over this important commercial area, Panama R.R. Co. v. Johnson, 1923, 264 U.S. 375, 386, 44 S.Ct. 391, 68 L.Ed. 748, prior to the enactment of the Ship Mortgage Act admiralty had no jurisdiction over a suit to foreclose a mortgage on

a ship. Detroit Trust Co. v. The Barlum, 1934, 293 U.S. 21, 32, 55 S.Ct. 31, 79 L.Ed. 176. The need for exclusive jurisdiction of the admiralty court and uniformity of procedure in ship mortgage foreclosure proceedings was stressed when the Senate held its hearings on the Merchant Marine Bill. Thus the legislative history clearly shows that:

> This bill is drawn with the intent of . . . providing for a speedy and uniform practice of foreclosure in the Federal Courts instead of leaving the mortgagees to the varying procedures of the courts of the several states.

Hearings Relative to the Establishment of an American Merchant Marine, Committee on Commerce, United States Senate, 66th Cong., 2d Sess., at 933.

It is clear that Congress intended that the ready availability of credit to support interstate commerce should not be impeded by parochial limitations and that the Act would wholly and completely supersede state law and practice in every respect.

In accordance with the national scope of the Ship Mortgage Act it must be construed, if possible, to maintain the desired uniformity necessary to effectuate its purposes. Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and inter-

state relations. Romero v. International Terminal Operating Co., 1959, 358 U.S. 354, 373, 79 S.Ct. 468, 3 L.Ed. 2d 368; Just v. Chambers, 1941, 312 U.S. 383, 389-390, 61 S.Ct. 687, 85 L.Ed. 903; Southern Pacific Co. v. Jensen, 1917, 244 U.S. 205, 216, 37 S.Ct. 524, 61 L.Ed. 1086.

We perceive no void in the statutory scheme here. Therefore, it is not necessary to turn to state law to implement the act with respect to deficiency judgments. Indeed, "to engraft the various nuances of state law onto federal legislation would introduce an undesirable lack of uniformity in the interpretation of Congressional enactments" and would impede the harmony and uniformity sought by the Act. *See* Mastan Co. v. Steinberg, *supra.*

The Ship Mortgage Act, when read together with the statutes delineating the judicial sale procedure in the federal courts forms a comprehensive procedure for the foreclosure of a preferred ship's mortgage, the sale of the vessel and any resulting deficiency adjudged against the debtor *in personam.*

46 U.S.C.A. § 951 provides that a mortgagee may enforce his lien by a suit *in rem* in admiralty. Original jurisdiction is granted exclusively to the district courts. Section 954(a) permits the mortgagee to bring suit *in personam* against the mortgagor in admiralty for any deficiency in the amount of the indebtedness secured by the vessel. Fed. R. Civ. P. E(9) (b) provides that a judicial sale may be held prior to the completion of the foreclosure action. 28 U.S.C.A. § 2004 directs that any personalty sold under order of a court must be sold in accordance with Section 2001. The latter sec-

tion provides for both private and public sales and defines the prerequisites necessary for their validity. Section 2001(b) requires, *inter alia*, that the court appoint three disinterested persons to appraise the property before it can confirm a *private* sale. There is no appraisal requirement under Section 2001(a) for a *public* sale.

Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded. *See e.g.*, Federal Trade Commission v. Sun Oil Co., 1963, 371 U.S. 505, 514-515, 83 S.Ct. 358, 9 L.Ed.2d 466 and Pena-Cabanillas v. United States, 9 Cir. 1968, 394 F.2d 785, 789-790. "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . is not to construe the Act but to amend it." Detroit Trust Co. v. The Barlum, 293 U.S. *supra* at 38, 55 S.Ct. at 36.

Since Congress established the necessity of appraisal before private sale and excluded the necessity for it at public sale and instead provided for the public sale to be under the court's direction, we are not at liberty to disregard the explicit legislative mandate and impose additional requirements borrowed from state law for a public sale.

It is well settled that the determination as to the fairness of the sale price of a vessel at public sale is left to the sound discretion of the district court, that is, the court can refuse to confirm the sale if it feels that the price is grossly inadequate. United States v.

Wells, 5 Cir. 1968, 403 F.2d 596, 598; Ghezzi v. Foss Launch & Tug Co., 9 Cir. 1963, 321 F.2d 421, 425. A mortgagor is therefore fully protected without the requirement of an appraisal under the comprehensive procedure provided by federal law.

We hold that the Louisiana statute may not limit or restrict the application of the Ship Mortgage Act or affect the uniform application of that Act so as to defeat the Congressional purposes in adopting such legislation.

The panel opinion vacated the deficiency judgment in reliance upon Louisiana law. We agree that the deficiency judgment must be vacated but for a different reason. The liability under the contract upon which the mortgage is based has been remanded to the district court for a new trial. Until that action is decided, any application for a deficiency judgment would be premature. The sale and its confirmation were not before the Court; consequently, they remain unaffected.

The deficiency judgment is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

COLEMAN, Circuit Judge, with whom BELL and AINSWORTH, Circuit Judges join, dissenting:

I adhere to the views originally expressed in the panel opinion, 431 F.2d 714. The effect of that decision was

that there is no federal law of mortgages; the mortgagors, mortgagees, and guarantors chose to define their liabilities in exact keeping with the Louisiana statutes; and Admiralty courts have no jurisdiction to rewrite the contract. In my opinion, the Ship Mortgage Act contains nothing which would deny the parties this right and its silence should not authorize court-made contracts in search of some kind of undefined "uniformity."

In short, it is my view that once a mortgage is made the Act provides a method for its registration and for the enforcement of its terms. The Act makes no attempt to prescribe the terms upon which parties may voluntarily bind themselves. Hence, striving for "uniformity", the en banc Court has missed the focal point of the panel decision of this controversy. Surely, it does not mean to hold that because an admiralty court is empowered to ascertain and adjudge a deficiency it can thereby impose one which is expressly negated by the contract.

Moreover, I flinch from the injustice of the result. If McDermott prevails on the issue of breach of contract, then it is to be permitted not only to keep the vessels but to be paid for them as well (all but a small part of the originally agreed purchase price). Moreover, McDermott keeps all the costly equipment installed by Fish Meal. I think the confirmation of the judicial sale sought should be re-opened. This was not a judicial sale to a third party for value. The mortgagee was the purchaser and it is still before the Court.

I respectfully dissent and, for my part, reiterate all that was said in the original panel opinion.

I am authorized by Judges BELL and AINSWORTH, the other members of the original panel, to say that they join in this dissent.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.